# Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5–21–42 OF 2000 (S2–21–42 OF 2000)
ABDUL MALIK ISHAK J
31 OCTOBER 2005

*Civil Procedure — Pleadings — Amendment of statement of claim after close of pleadings — Discretion — Principles to be applied — Amendment to include a cause of action for breach of statutory duty under s 22 of the Federal Territory (Planning) Act 1982 or under s 22(2) of the Town and Country Planning Act 1976 or under s 5 of the Street, Drainage and Building Act 1974 — Amendment to include a cause of action relating to misfeasance of public office — Whether cause of actions in amended statement of claim raised for the first time — Inordinate delay in filing the application to amend statement of claim — Whether delay fatal to application*

The defendant is a local government in charge of the municipal affairs of the city of Kuala Lumpur. Pursuant to s 124 of the Local Government Act 1976 (Act 171) and s 11 of the Federal Capital Act 1960 (Act 190), the provisions of the Public Authorities Protection Act 1948 ('PAPA 1948') would apply in relation to the defendant. By virtue of s 2 of the PAPA 1948, the plaintiffs were supposed to file the proceedings in respect of the causes of action as pleaded in the amended statement of claim within 36 months. The alleged cause of action arose in September 1997 because the defendant was alleged to have failed to complete the works in the project known as 'cadangan membina persimpangan bertingkat di atas Jalan Tun Razak/Jalan Ampang, Kuala Lumpur'. This was an appeal to the judge in chambers that arose from the decision of the deputy registrar granting all the proposed amendments sought for by the plaintiffs to the statement of claim.

**Held**, allowing the defendant's appeal:

(1) For a cause of action for breach of a statutory duty, it must be proved that the statutory duty was breached and that the workings of the statute must be considered to determine whether there is any liability. The original statement of claim had not made any reference to any statute or to any provisions of any statute or to any alleged breach. Furthermore, the facts as pleaded in the original statement of claim did not support the allegations of the breach of the statutory duty under s 22 of the Federal Territory (Planning) Act 1982 or under s 22(2) of the Town and Country Planning Act 1976 or under s 5 of the Street, Drainage and Building Act 1974 because the issues in regard to the planning or to the approvals of the plan were not raised, at all, in the original statement of claim. The alleged breach of the statutory duty would require completely different facts from that pleaded in the original statement of claim. The proposed amendments to include the new cause of action for breach of the statutory duty and the new facts relating to the cause of action for breach of

the statutory duty ought not to be allowed. In addition, the proposed amendments to include the breach of the statutory duty under s 22 of the Federal Territory (Planning) Act 1982, s 22(2) of the Town and Country Planning Act 1976 and s 5 of the Street, Drainage And Building Act 1974 were futile exercises (see paras 50–51).

(2) The cause of action relating to misfeasance of public office was raised for the very first time in the amended statement of claim. Based on the pleadings in the original statement of claim, the plaintiffs' claim was founded on negligence and nuisance. The original statement of claim lacked the requisite details on the subject of misfeasance of public office. The issue of malice or unlawful nature of the defendant's action which would, in law, constitute the tort of misfeasance in public office was not pleaded at all in the original statement of claim. The proposed amendments advanced by the plaintiffs which the plaintiffs alleged to constitute misfeasance of public office of raising new facts to show that the defendant had recklessly allowed the commencement of works without taking reasonable and expedient steps to conduct the necessary surveys and studies were in sharp contrast to what had been pleaded in the original statement of claim (see paras 53, 55).

(3) The negligence sought to be adduced by the plaintiffs in the proposed amendments were based on substantially different facts which were not pleaded earlier. The new cause of action relating to negligence as set out above ought not to be allowed after the time period for limitation had expired (see para 57).

(4) The plaintiffs ought to give good reasons as to the delay in filing the present application to amend. Apart from stating that the discovery of the documents involved voluminous materials, nothing else was being stated in the plaintiffs' affidavit as to how the documents were relevant to the present case which necessitated the filing of the present application to amend. The plaintiffs had failed to give any explanation in their subsequent affidavits in regard to the issue of delay and in the absence of such an explanation, there was no material before the court to weigh in a balance the proposed amendments as suggested by the plaintiffs. The delay must therefore be construed to be fatal (see paras 59–60, 63).

**[Bahasa Malaysia summary**

Defendan adalah kerajaan tempatan yang bertanggungjawab ke atas hal ehwal perbandaran Kuala Lumpur. Menurut s 124 Akta Kerajaan Tempatan 1976 (Akta 171) dan s 11 Akta Ibu Kota Persekutuan 1960 (Akta 190, peruntukan dalam Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA 1948') adalah terpakai ke atas defendan. Atas sebab s 2 PAPA 1948, plaintif sepatutnya memfailkan prosiding berkenaan dengan kausa tindakan seperti yang diplidkan dalam penyata tuntutan terpinda dalam masa 36 bulan. Kausa tindakan timbul pada September 1997 kerana defendan dikatakan telah gagal untuk menyiapkan satu projek yang dikenali sebagai 'cadangan membina persimpangan bertingkat di atas Jalan Tun Razak/Jalan Ampang, Kuala Lumpur'. Ini adalah rayuan kepada hakim dalam kamar yang timbul daripada keputusan timbalan pendaftar yang membenarkan semua cadangan pindaan yang dipohon oleh plaintif kepada penyata tuntutannya.]

**Diputuskan**, membenarkan rayuan defendan

(1) Dalam kausa tindakan bagi keingkaran kewajipan berkanun, ianya perlu dibuktikan bahawa kewajipan berkanun tersebut telah diingkari dan segala-galanya tentang statut tersebut perlu dipertimbangkan untuk menentukan sama ada terdapat sebarang liabiliti. Penyata tuntutan yang asal tidak membuat sebarang rujukan kepada sebarang statut atau peruntukan dalam mana-mana statut ataupun kepada sebarang kemungkiran yang dikatakan. Tambahan lagi, fakta-fakta yang diplidkan dalam penyata tuntutan yang asal tidak menyokong dakwaan kemungkiran kewajipan berkanun di bawah s 22 Akta (Perancangan) Wilayah Persekutuan 1982 atau di bawah s 22(2) Akta Perancangan Bandar dan Desa 1976 atau di bawah s 5 Akta Jalan, Parit dan Bangunan 1974 kerana isu yang berkenaan dengan perancangan atau kelulusan pelan tidak dibangkitkan sama sekali dalam penyata tuntutan yang asal. Dakwaan kemungkiran kewajipan berkanun memerlukan fakta yang sama sekali berlainan daripada yang telah diplidkan dalam penyata tuntutan yang asal. Cadangan pindaan untuk memasukkan kausa tindakan baru bagi kemungkiran kewajipan berkanun dan fakta-fakta baru yang berkaitan dengan kausa tindakan bagi kemungkiran kewajipan berkanun tidak sepatutnya dibenarkan. Selain daripada itu, pindaan yang mencadangkan untuk menambah kemungkiran kewajipan berkanun di bawah s 22 Akta (Perancangan) Wilayah Persekutuan 1982, s 22(2) Akta Perancangan Bandar dan Desa 1976 dan s 5 Akta Jalan, Parit dan Bangunan 1974 adalah satu tindakan yang sia-sia (lihat perenggan 50–51).

(2) Kausa tindakan berkenaan dengan salah laku pegawai awam telah dibangkitkan buat kali pertama dalam penyata tuntutan terpinda. Berdasarkan pliding dalam penyata tuntutan yang asal, tuntutan plaintif adalah diasaskan pada kecuaian dan kacau ganggu. Penyata tuntutan yang asal tidak mempunyai butir-butir yang diperlukan berkenaan dengan salah laku pegawai awam secukupnya. Isu berkenaan dengan niat jahat atau tindakan defendan yang salah, dari segi undang-undang membentuk tort salah laku pegawai awam tidak diplidkan langsung dalam penyata tuntutan yang asal. Pindaan yang dicadangkan oleh plaintif di mana plaintif mendakwa telah membentuk satu salah laku pegawai awam, dengan membangkitkan fakta baru yang menyatakan bahawa defendan telah dengan cuainya membenarkan bermulanya kerja-kerja tanpa mengambil sebarang langkah yang sepatutnya dan sewajarnya untuk menjalankan tinjauan dan kajian yang diperlukan adalah secara jelas bertentangan dengan apa yang telah diplidkan dalam penyata tuntutan yang asal (lihat perenggan 53, 55).

(3) Kesalahan kecuaian yang diutarakan oleh plaintif dalam pindaan yang dicadangkan adalah berdasarkan fakta-fakta yang sememangnya berbeza yang tidak diplidkan lebih awal. Kausa tindakan yang baru yang berkaitan dengan kecuaian seperti yang telah dinyatakan di atas tidak sepatutnya dibenarkan selepas tempoh had masa telah tamat (lihat perenggan 57).

(4) Plaintif perlu memberi alasan yang bagus atas kelewatan dalam memfailkan permohonan untuk membuat pindaan ini. Selain daripada menyatakan bahawa penemuan dokumen melibatkan material yang besar jumlahnya; tiada perkara lain telah dinyatakan dalam afidavit plaintif berkenaan bagaimana

dokumen-dokumen tersebut relevan dalam kes ini yang mana telah membuatkan perlunya untuk memfailkan permohonan untuk pindaan ini. Plaintif telah gagal untuk memberi sebarang penjelasan dalam afidavit seterusnya berkenaan dengan isu kelewatan dan tanpa penjelasan berkenaan perkara itu, tiada material yang boleh dipertimbangkan oleh mahkamah sebagai mengimbangkan pindaan yang dicadangkan oleh plaintif. Oleh itu, kelewatan ini dikira sebagai memudaratkan (lihat perenggan 59–60, 63).

**Notes**

For cases on amendment of statement of claim after close of pleadings, see 2 *Mallal's Digest* (4th Ed, Consolidated Subject Index) paras 4716–4717.

**Cases referred to**

*Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629 (refd)
*Andrew Chioh Eng Hua & Anor v Kewangan Utama Bhd* [1998] MLJU LEXIS 925 (refd)
*Chan Mui Eng & Ors v Chua Chu Huwe & Anor* [1994] 1 SLR 375 (refd)
*Chaw Anui v Tan Kim Chai* [2001] MLJU LEXIS 595 (refd)
*Chin Kok Kwong Construction Sdn Bhd v Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41 (refd)
*Credit Co (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (refd)
*GL Baker Ltd v Medway Building And Supplies Ltd* [1958] All ER 540 (refd)
*Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224 (refd)
*Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 (refd)
*Ketteman & Ors v Hansel Properties Ltd* [1988] 1 All ER 38 Letang v Cooper [1965] 1 QB 232 (refd)
*M-Fold Development Sdn Bhd v Altrue Sdn Bhd* [2002] MLJU 71 (refd)
*Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793 (refd)
*Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353 (refd)
*Ribuwajar Development Sdn Bhd v Ratus Mayang Sdn Bhd* [2001] MLJU 693 (refd)
*Steamship Mutual Underwriting Association Ltd & Ors v Trollope & Colls Ltd & Ors* [1986] 2 Const LJ 224 (refd)
*Suruhanjaya Pelabuhan Pulau Pinang v Boss s/o Ramasamy* [2000] 4 MLJ 153 (refd)
*Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359 (refd)
*Tildesley v Harper* [1878-79] 10 Ch D 393 (refd)
*Weldon v Neal* [1887] 19 QBD 394 (refd)
*Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 (refd)
*Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 (refd)

**Legislation referred to**

Federal Territory (Planning) Act 1982 s 22
Rules of the High Court 1980 O 1A, 20 r 5 (3), (4), (5)
Rules of the Supreme Court [UK] O 20 r 5 (3), (4), (5)
Street, Drainage And Building Act 1974 s 5
Town And Country Planning Act 1976 s 22(2)

*Firoz Hussein bin Ahmad Jamaluddin (Puthucheary Firoz Asmet & Mai) for the plaintiffs.*
*Thangaraj Balasundram (Thangaraj & Associates) for the defendant.*

**Abdul Malik Ishak J:**

INTRODUCTION

**[1]** This judgment relates to Civil Suit No S5–21–42 of 2000 ('the S5 suit') and this S5 suit went through the process of case management during the fast track system that was introduced in the civil divisions of the High Courts stationed at Wisma Denmark. During the fast track system, all the files were controlled centrally by the case management judge. No files were kept by the other judges in the civil divisions. All the files were kept in the central registry managed by the case management judge.

**[2]** Unfortunately, the file pertaining to the S5 suit was misplaced. It went missing. The central registry was unable to locate the file pertaining to the S5 suit.

**[3]** In early 2005, I was told that there was an appeal against my decision in regard to encl 35. That decision of mine was made during the fast track system. I was unable to recall what was encl 35 all about. I called the relevant Deputy Registrar and directed her to call the parties to re-construct the whole file pertaining to the S5 suit. It took time for the parties to re-construct the whole file. Finally, the parties succeeded in re-constructing the whole file pertaining to the S5 suit.

**[4]** The re-constructed file was handed to me and I noticed that it had been given a new civil suit number bearing the following digits: S2–21–42 of 2000 ('the S2 suit'). There was also a memorandum by the senior assistant registrar of the S2 court informing me that encl 35 of the file pertaining to the S5 suit has been re-numbered and it now carries a new enclosure number, namely, encl 27 in the S2 suit.

**[5]** Anxiously I perused through encl 27 of the S2 suit. This was what I found. That it was a notice of appeal to the judge in chambers that arose from the decision of the deputy registrar granting all the proposed amendments sought for by the plaintiffs as found in encl 28 — now re-numbered as encl 20. The deputy registrar had granted all the proposed amendments to the statement of claim as seen in Annexure 'A' to encl 28 — now re-numbered as encl 20. The defendant was most unhappy and being aggrieved filed a notice of appeal to the judge in chambers as found in encl 35 – now re-numbered as encl 27.

**[6]** I too found that I heard the parties during the fast track system and I allowed the defendant's appeal in encl 35 (now encl 27) with costs. The plaintiffs filed an appeal to the Court of Appeal. It was rather unfortunate that I was only told of the

appeal in the early part of 2005. I do not know why and I do not wish to hazard a guess. My duty now would be to write a judgment in regard to that appeal. I shall do so now.

TO THE HEART OF THE MATTER

**[7]** The general principles regarding amendments to the pleadings have been stated by other judges before me. I subscribe fully to those general principles of law. But in so far as this appeal in encl 35 (now encl 27) was concerned, I had to tread cautiously because the nature of the amendments sought by the plaintiffs in the amended statement of claim was to introduce an entirely new causes of action after the time period of limitation had set in.

**[8]** Factually speaking, the defendant is a local government in charge of the municipal affairs of the city of Kuala Lumpur. Pursuant to s 124 of the Local Government Act 1976 (Act 171) and s 11 of the Federal Capital Act 1960 (Act 190), the provisions of the Public Authorities Protection Act 1948 would apply in relation to the defendant and, consequently, in relation to the whole case at hand. It was with this background in mind that I approached the appeal in encl 35 (now encl 27). That being the background scenario, by virtue of s 2 of the Public Authorities Protection Act 1948, the plaintiffs were supposed to file the proceedings in respect of the causes of action as pleaded in the amended statement of claim within 36 months. That would be the law.

**[9]** Now, as pleaded in para 10 of the amended statement of claim, the alleged cause of action arose in September 1997 because the defendant, so it was alleged, had failed to complete the works in the project known as 'cadangan membina persimpangan bertingkat di atas Jalan Tun Razak/Jalan Ampang, Kuala Lumpur' ('the said works') by September 1997. Since the alleged cause of action arose in September 1997 and by virtue of s 2 of the Public Authorities Protection Act 1948 the plaintiffs' cause of action would be barred by limitation in September 2000. It was not in dispute that the proposed amendments as set out in the amended statement of claim would raise new causes of action. It would be ideal, at this juncture, to reproduce paras 6 and 7 of affidavit no 5 (bearing enclosure number 19 in the re-constructed file — the S2 suit) which was filed in support of the plaintiffs' application to amend the statement of claim. These paras 6 and 7 of encl 19 were worded as follows:

> Paragraph 6: Based on the information recently discovered by our solicitors as stated above, we were advised by our solicitors and verily believe that the matters that required application to amend the writ summons and the statement of claim include the cause of action that arises from the same facts or larger part of the same facts as the cause of action in relation to the relief that has been claimed in this action.
>
> Paragraph 7: We are informed by our solicitors and verily believe that even though the effect of the proposed amendments in encl 'A' are to add or to substitute a new cause of action, the suggested amendments may be allowed by this Honourable Court if the new cause of action arose from the same facts or larger part of the same facts as the cause of action in relation to the relief that has been claimed.

**[10]** The plaintiffs admitted by way of paras 6 and 7 of encl 19 that the proposed amendments to the statement of claim would raise new causes of action. Admissions of this nature would be admissible. Once admitted, it ceased to be in issue and it would be accepted as an admission.

**[11]** Two things must now be put in the forefront. Firstly, that the defendant is a local government and it is a public authority and it was this feature that made this case unique. Secondly, in proposing the amendments to the statement of claim, the plaintiffs admitted that it had raised new causes of action.

**[12]** As demonstrated, Parliament in its wisdom had limited the time for bringing any cause of action against a public authority, like the defendant here, within 36 months. Section 2(a) of the Public Authorities Protection Act 1948 (Act 198) enacts as follows:

> 2. Protection of persons acting in execution of statutory or other public duty.
>
> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;'

**[13]** The rationale of the law of limitation has been lucidly explained by the late Hashim Yeop Sani, Chief Justice of Malaya, in the case of *Credit Co (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 at pp 413–414 in this way:

> The limitation law is promulgated for the primary object of discouraging plaintiff's from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accordance with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

**[14]** It goes without saying that stipulations as to time must be strictly followed and cannot be treated lightly. Legal practitioners should always be wary of the time constraint and must always double check whether limitation has set in. Thus, when a defence of limitation is clearly available to the defendant, like the present case at hand, the defendant ought not to be deprived of it and that right cannot be taken away by anyone willy-nilly. Lord Brightman in the case of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1, puts it rather well when his Lordship said at p 5 of the report:

> In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable Their Lordships see no

compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the 1948 Ordinance expired, merely because the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June 1974 possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he had been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.

**[15]** This very passage was generously applied by the Court of Appeal in the case of *Suruhanjaya Pelabuhan Pulau Pinang v Boss s/o Ramasamy* [2000] 4 MLJ 153, 165. Now, the English cases before the English Rules of the Supreme Court ('RSC') were revised in 1962 to incorporate the new RSC O 20 r 5(3), (4) and (5) which is in pari materia with O 20 r 5(3), (4) and (5) of the Rules of the High Court 1980 ('RHC') had clearly laid down that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action since issuance of the writ have become barred by the statute of limitations. A classic example would be the case of *Weldon v Neal* [1887] 19 QBD 39 4, a decision of the Court of Appeal with a coram of Lord Esher MR, Lindley LJ and Lopes LJ. There, Lord Esher MR writing a separate judgment had this to say (see p 395 of the report):

We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.

**[16]** It would not be out of place to reproduce verbatim the new O 20 r 5(3), (4) and (5) of the RHC and I shall do so now:

ORDER 20

AMENDMENT

5 Amendment of writ or pleading with leave (O 20 r 5)

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in

which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

**[17]** This new O 20 r 5(3), (4) and (5) of the RHC was scrutinised by the then Supreme Court in the case of Government of Malaysia v Mohamed Amin bin Hassan [1986] 1 MLJ 224 where Lee Hun Hoe CJ (Borneo) writing a separate judgment held that even though the new O 20 r 5(3), (4) and (5) of the RHC allowed amendments to be made after the expiry period of limitation, it did not mean that there was any relaxation of the principle formerly applied under Weldon v Neal. At p 227 of the report, this was what Lee Hun Hoe CJ (Borneo) had to say:

It was argued in *Heaven v Road and Rail Wagons Limited* [1965] 2 All ER 409; [1965] 2 QB 355 that under the new provisions of Order 20 rule 5 a different situation now prevailed in regard to granting of amendments after the expiry of the period of limitation. However, in Megaw J's view the fact that in certain cases under the English Order 20 rule 5 amendments were to be permitted although the statutory period had run did not mean there was any relaxation of the principle formerly applying under *Weldon v Neal* [1887] 19 QBD 394. Lord Denning, on the other hand, took a different view. In *Chatsworth Investments, Ltd v Cussins (Contractors) Ltd* [1969] 1 All ER 143, 145; [1969] WLR 1, 5 he stated as follows:

> ... Since the new rule, I think we should discard the strict rule of practice in Weldon v. Neal (1887) 19 QBD 394. The courts should allow an amendment whenever it is just so to do, even though it may deprive the defendant of a defence under the Statute of Limitations…

Expressing that he favoured the approach of Megaw J and was unable to agree with the dictum of Lord Denning in Braniff's case, Widgery LJ went on at p 963 to say:

> … I find it very difficult to think that, when specific exemption is made in RSC, O 20 r 5(3), (4) and (5), in cases where the statute has run it is then legitimate to interpret the rule as making similar provision available and similar excuses available in cases which are not within the precise terms of those three paragraphs.

What Widgery LJ said applies with equal force to similar provisions under O 15 r 1 of the Subordinate Courts Rules 1980 and O 20 r 5 of the Rules of the High Court 1980.

**[18]** Continuing at pp 227–228 of the report, his Lordship Lee Hun Hoe CJ (Borneo) aptly said:

What the respondent did was not correcting the name of a party. Neither was it a matter of mistake. It was merely the addition of a new and different party. This is not permissible under any provision of the O 15 r 1, particularly when the period of limitation affecting the proposed plaintiff had expired. This is not a case of altering a party suing in his representative capacity into his personal capacity. It is a case of adding a new party to the original suit. For that very reason the learned magistrate rightly refused to grant leave to Hanah bte Ahmad to be made the second plaintiff. What special reason is there to

differentiate the case of the respondent. It is merely a coincidence that he sued in a representative capacity. Clearly the court has no power to resuscitate an action which must fail in limine upon a plea of limitation. See *Lee Lee Cheng v Seow Peng Kwang* [1958] MLJ 271.

The learned judge was very much influenced by the facts that the respondent was already a party in his representative capacity on the commencement of the proceedings and that he could also validly sue in his personal capacity if he wanted to at the time. He did not do so until he had obtained his medical report, a considerable time later. Nevertheless, the learned judge was of the view that by means of a liberal interpretation of O 15 r 1(4) the respondent could by amendment be added as a party in his personal capacity. With respect to the learned judge whose judgments are always well thought out, I must say that I am not aware of any authority which allows the addition of a party in such circumstances as to defeat the defendant of his defence under the Statute of Limitation. All the English cases cited show that the amendments were allowed to correct the name of a party (O 20 r 5(3) or to alter the capacity in which the party sues or is used (O 20 r 5(4) or to add or substitute a new cause of action (O 20 r 5(5)). The learned judge was quite aware that the provisions of O 15 r 1 and similar provisions in the Rules of the High Court 1980 confer express and unmistakable powers which apply only to those special circumstances within the scope of these provisions which could not have been intended to prejudice or remove en masse the right or benefit conferred by any Statute of Limitation.

In the matter of construction it is well to remember that in *Magor & St Mellons Rural District Council v Newport Corporation* [1952] AC 189, 191 the House of Lords has laid down clearly that in construing a statute the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. To do so would be to usurp the function of the legislature. In that case Lord Simonds made this important observation:

> The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited …

The court should not try to extend the provisions of O 15 r 1 beyond their natural and proper limit in order to supply omissions or defects nor strain them to the justice of an individual case.

*Halsbury's Laws of England* (3rd Ed), Vol 24, p 201, para 358 has this to say:

> The court will refuse to allow a writ to be amended by the addition of a party when the effect of the amendment will be to defeat the operation of the statute. If a writ has been amended, the original writ, not the amendment, is the commencement of the action.
>
> The issue of a writ in one action, before the expiration of the statutory period, only keeps alive the cause of action in the action in which it was issued, and if another action for the same cause is commenced after the expiration of the statutory period, the second action will be barred.

For reasons given I would allow the appeal. Costs to the appellant here and the courts below. Deposit to be refunded to the appellant.

**[19]** Syed Agil Barakbah SCJ writing a separate judgment agreed with Lee Hun Hoe CJ (Borneo). This was what Syed Agil Barakbah SCJ said at pp 231–232 of the report:

This appeal relates to the main question whether an amendment should be allowed to add a second plaintiff and a new cause of action to the writ and statement of claim after the lapse of the statutory period of limitation. It is an important point of law and procedure. The relevant provision is O 15 r 1(4) of the Subordinate Courts Rules 1980 which is substantially the same as O 20 r 5(4) of the Rules of the High Court 1980. The magistrate who first heard the application gave the respondent leave to amend notwithstanding the objection that the action was time-barred under s 2(a) of the Public Authorities Protection Act 1948. The judge on appeal agreed with the decision of the magistrate and dismissed the appeal. The appellant being dissatisfied has brought the present appeal before this court.

I have had the advantage of reading the judgments of Lee Hun Hoe, CJ (Borneo), and George Seah, SCJ, both of which cover quite in detail the background of the case, the relevant provisions of the law and the authorities in support of their respective conclusions. In view of the conflicting decisions, I have to give my own without the necessity of repeating the facts and circumstances of the case.

Order 15 r 1(1) gives discretionary power to the court to allow any party to amend his pleading on such terms as to costs or otherwise as it thinks just. It is subject to O 8 r 6, 7 and 8 and to the provisions of rule 1 paras (2) to (5). Paragraph (2) empowers the court to allow an application for amendment made after the expiry of the limitation period subject to the provisions formulated in paras (3), (4) and (5), if it thinks just to do so. Thus, para (3) enables amendment to be made to correct the name of a party even though such amendment will result in substituting a new party so long as the court is satisfied that the mistake is genuine and not misleading. Paragraph (4) allows the court to alter the capacity in which a party sues by way of amendment, whether as plaintiff or defendant by counter claim, as long as the party might have sued in the new capacity at the date of the issue of the summons. Finally, para (5) empowers the court to allow amendment to add or substitute a new cause of action if such cause of action arises out of the same or substantially the same facts as the existing cause of action on which relief has already been claimed by the party applying for leave to amend. In short, the amendments allowable at paragraph (2) as specified in paras (3), (4) and (5) relate to curing specified defects in the writ or pleading and not to other defects which are outside their scope. To that extent, it has taken a substantial step away from the harsh rule in *Weldon v Neal* [1887] 19 QBD 394. The circumstances as specified however have not imported any relaxation of the former principle governing the power to allow such amendments. This view of Megaw J in *Heaven v Road and Rail Wagons, Ltd* [1965] 2 All ER 409; [1965] 2 QB 355 is reinforced by Widgery LJ in *Braniff v Holland & Hannen and Cubitts* [1969] 3 All ER 959. Rule 1(1) may be wide, but in my view does not cover a case where the period of limitation has expired. The real point is whether the present appeal falls under para (4).

I would construe the rule by adopting the ordinary canon of construction and by giving the words their proper and natural meaning in accordance with the intention of legislature. It is to be noted that the requirement with regard to pleading a time bar under the statute of limitation which is acquired after the lapse of the statutory period is an accrued right, even though it arises under an Act which is procedural. Lord Brightman when considering this point in the Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 did not agree with the generality of the proposition stated by Lord Denning MR in *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 that the statute of limitation does not confer any right on the defendant, but it only imposes a time limit on the plaintiff. He was of the opinion that an accrued entitlement on the part of a person to plead the lapse of limitation period as an answer to future proceedings is just as much a 'right' as against any statutory or contractual protection against a future suit. I agree and adopt this principle. In my view, O 15 r 1 must be construed in the light of this important principle.

I read the words 'to alter the capacity' in para (4) to mean to modify or substitute the capacity and does not extend to add to the capacity in which the party has sued. If an

amendment is allowed to add a party to the writ, it will amount to adding a new party apart from adding a new cause of action. What the magistrate's court did in the present case was to allow amendment by allowing the respondent who was already suing as the plaintiff in the representative capacity to be added as the second plaintiff in his personal capacity after the expiration of the limitation period. That, in my opinion, violates the statutory limitation because it takes away the accrued right of the appellant to plead the lapse of limitation period. Secondly, I do not think it is the intention of legislature to allow such amendment at that stage. It is not a technical defect because it introduces a new party to the action and leave to amend should have been applied for prior to the expiry of the statutory period of limitation.

A similar situation arose in Braniff v Holland. It was an application to amend the writ to include the second defendant after the statutory period of limitation has expired. Originally the plaintiff sued the first defendant for damages in respect of injuries he had sustained while working as an employee of the first defendant. At first, the first defendant applied for leave to issue third party notice against the second defendant claiming indemnity against any damages which might be awarded, but that was refused by the Master. Subsequently, by mutual arrangement between the plaintiff and the first defendant, the plaintiff applied for leave to amend the writ and statement of claim by joining the second defendant. The application was allowed, but subsequently on appeal by the second defendant the writ was set aside on the ground that the period of limitation has expired when the plaintiff's application was made. The appeal to the Court of Appeal was also dismissed.

The ratio decidendi was that as conceded by counsel for the plaintiff with whom Widgery LJ agreed, the case did not come within paras (3), (4) and (5) of the rule which are the directly relevant paragraphs when considering amendments made after the expiry period of limitation. I am of the view that the case before me is in the same category. It has not come within the ambit of para (4), and for that matter under paras (3) or (5). It is therefore not just to grant leave to amend.

**[20]** In *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230, Abdul Hamid Omar, Acting Lord President, disagreed with the judgment of Lee Hun Hoe CJ (Borneo) in the case of *Government of Malaysia v Mohamed Amin bin Hassan* and this was what Abdul Hamid Omar, Acting Lord President said (see p 233 of the report):

I have had the advantage of reading the judgment of Lee Hun Hoe CJ (Borneo) in *Government of Malaysia v Mohamed Amin bin Hassan* [1986] 1 MLJ 224. I do not think that that case is authority for the proposition that if a new or a substantially new relief is added or substituted by a new cause of action even though based on the same or substantially the same facts, the court is not under the circumstances empowered to grant leave to amend under r 5(5).

**[21]** Earlier on, at pp 232–233 of the report, Abdul Hamid Omar, Acting Lord President, succinctly said:

It is also clear from the established principle that the court has power to grant an amendment after the expiry of the limitation period notwithstanding that the effect of the amendment will be to add or substitute a new cause of action subject to one very important condition, namely, that the new cause of action must arise out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed.

There is absolutely nothing to show from the long line of authorities that if a new or substantially new relief arises out of the new cause of action the court is ceased of its power

to grant such leave, or that by doing so the court would be acting outside the scope of r 5. I am unable to accept any contention to that effect. Paragraph (5) of r 5, in my view, is clear in its terms. Effect should therefore be given to the rule which clearly enables the court to exercise its discretion in cases where it is satisfied that the new cause of action arises out of the same or substantially the same facts as the new cause of action in respect of which relief has already been claimed.

The fact that a new relief or substantially new relief has arisen out of a new cause of action should not be a bar to the court's power to grant leave under r 5. A new or substantially new relief which arises out of a new cause of action is in effect ancillary to the new cause of action and is indeed part and parcel of that new cause of action. The essential question to be considered in each case is 'whether the changes alleged in the amendment sought to be made are the same or substantially the same as those alleged to support a cause of action already pleaded.' (*The Supreme Court Practice* 1985 para 20/5–8/16 p 345).

The rule is silent: indeed, it does not make the granting of leave to amend under r 5 conditional upon there being no new or substantially new relief arising out of the new cause of action. To construe otherwise would, in my view, be reading into r 5 something which is not provided for. I am firmly of the view that a new relief is not a relevant consideration. In this regard it may be pertinent to refer to the definition of the words 'cause of action' expressed by Lord Justice Diplock in *Letang v Cooper* [1965] 1 QB 232, at pp 242–243 as a 'factual situation the existence of which entitled one person to obtain from the court a remedy against another.' The definition in my view fortifies the point I am making in that a relief or a remedy is ancillary to and not separable from a cause of action. The word 'relief' in para (5) of r 5 is clearly intended to refer or apply to the original cause of action. It is merely a description with reference only to the original cause of action and should not be construed with reference to the new relief. It is clear beyond argument that it should not have the effect of restricting the court's power to grant leave to amend in cases where para (5) of r 5 is applicable.

**[22]** In similar vein, the Court of Appeal of Singapore laid down the following propositions of the law in the case of *Lim Yong Swan v Lim Jee Tee & Anor* [1993] 1 SLR 50, where Yong Pung How CJ (Singapore) when delivering the grounds of judgment of the Court of Appeal said at p 506 of the report:

What is common in all three paragraphs is this. For an application to come within any of the paragraphs, there must already be asserted in the writ or the pleading a set of allegations which, in spite of the expiry of the limitation period, reasonably identify the party suing or sued, which is capable of conveying the capacity of the party to sue or which permits the addition or substitution of another cause of action. In other words, the matters of identity, capacity or cause of action are already asserted or implied, from the inception of the writ or the filing of the pleading and it is merely a matter of correction to make explicit what is implicit.

The same view of the rule was taken by the Supreme Court of Malaysia in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230.

**[23]** Continuing at p 507 of the report, Yong Pung How CJ (Singapore) said in the same case:

We regret that we were unable to agree with those learned opinions in view of express words of O 20 r 5(1) which subjected the power to amend contained therein to the other provisions of the rule. These together with the history prior to the new paragraphs clearly

indicated that the scope of permissible amendments had been enlarged but also that the discretion of the court was not at large. The view taken by this court in '*The Virginia Rhea*' was clearly correct.

We were not alone in that view for the majority in *Brickfield Properties Ltd v Newton* [1971] 1 WLR 862; [1971] 3 All ER 328. (Cross and Edmund Davies LJJ) differed from Lord Denning MR, and the English Court of Appeal in *The 'Casper Trader'* differed from the view of Sachs LJ in the *Brickfield Properties case* [1971] 1 WLR 862; [1971] 3 All ER 328. In the latter, Staughton LJ stated at p 245:

> It is common ground that the amendments would introduce new causes of action, which would have been time-barred if raised in a new action on the date when the application was made. The six-year time limit expired in May 1990. Nevertheless, leave can be granted to make the amendments under O 20 r 5(2) and (5) if two conditions are satisfied, viz:
>
> (1) the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, and
>
> (2) if the court thinks it just to allow the amendment.

**[24]** Again, continuing at pp 508–509, Yong Pung How CJ (Singapore) said in the same case:

> A party seeking to amend under O 20 r 5(5) must therefore show:
>
> (1) that the new cause of action arises out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, and
>
> (2) if the court thinks it is just to grant leave to make the amendment.
>
> As to condition (1), we were in agreement with counsel for the respondents that the correct test was set out in the case of *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* [1986] 33 BLR 77 and approved in *'The Casper Trader'* [1991] 2 Lloyd's Rep 237: whether there is a sufficient overlap between the facts supporting the existing claim and those supporting the new claim.
>
> The scope of condition (2) was rather more complicated. Clearly, the fact that the party opposing the amendment would be deprived of an accrued right of limitation would not of itself make it unjust to give leave to amend. It is one of the factors that can be taken into account. The purpose of paras (2) to (5) was to remove that reason as an absolute bar and we have already set out the rationale behind the introduction of the paragraphs as stated in the *Supreme Court Practice*. Accordingly, we did not accept counsel for the appellant's submissions that the fact that the action was time-barred meant ipso facto that any amendment would be unjust to the appellant.
>
> When *The 'Casper Trader'* [1991] 2 Lloyd's Rep 237 was before the judge-in-chambers, Webster J expressed the view that consideration of whether it would be just to grant leave to amend under para (5) required a balancing of the applying party's need to amend and the prejudice to the opposing party's interests. 'Prejudice' in this context, in the opinion of the learned judge, meant at p 243:
>
> > For the purpose of answering this question I do not think it relevant simply to consider whether the defendants will or may have difficulty in defending the claim, specifically at the trial. In my view for any relevant prejudice to be found it must constitute prejudice resulting from the amendment, either in the sense that the defendants, in reliance on the

> claim originally made, altered their position so as to make it more difficult to defend the new claim now made or in the sense that it will be more difficult for them to defend that claim than it would have been had the claim been brought within the period of limitation.

We were in agreement with the view of the learned judge and would only add that it would also be relevant prejudice if the new cause of action would deprive the opposing party of any remedy against a third party.

Further, the prejudice to the opposing party may be prejudice that arose before the expiry of the limitation period, even though it only became relevant to the consideration of the matter after the period has expired: see *The 'Casper Trader'* [1991] 2 Lloyd's Rep 237 at p 248.

As regards the applying party's need to amend, this is a question of examining whether refusing leave to amend would cause injustice to the applying party. It does not, however, involve an examination of the merits of the applying party's case. Staughton LJ in *The 'Casper Trader'* [1991] 2 Lloyd's Rep 237 put the matter this way at p 248:

> For my part I do not think it right, on such an application, to make an appreciation of the plaintiffs' chances of success with or without the amendment, subject to four points:
>
> (1) If the plaintiffs' existing claim is bound to fail, that may possibly be relevant to what justice requires.
>
> (2) If it is bound to succeed, that could conceivably be relevant in deciding whether to allow a different cause of action leading to the same remedy but requiring much further investigation to be pleaded. However, it is difficult to imagine a defendant putting this forward as a reason why leave should be refused.
>
> (3) If the new claim is bound to fail, leave should be refused on ordinary principles.
>
> (4) If the new claim is bound to succeed, that may affect the justice of the case. It must be rare that any of these situations will arise. In other cases, provided that the new claim is fairly arguable, it does not seem to me that any investigation of the need to amend is appropriate.
>
> It will therefore be material, in any evenly balanced case, whether it is for the applying party to satisfy the court that it is just to grant leave or whether that task falls to the opposing party. We once again found assistance from the judgment of Staughton LJ in *The 'Caster Trader'* [1991] 2 Lloyd's Rep 237 where he said at p 247:
>
> > In my judgment it is not helpful to speak of the burden of proof, but rather of the burden of persuasion. If the court concludes that it cannot decide whether or not it is just to allow the amendment, the party applying for leave must fail. The burden of persuasion lies on him, and if it is not discharged his application should not succeed.
>
> Both the party making the application cannot be expected to adduce evidence on all points which might conceivably affect the justice of the case. He must undertake the task of establishing the factors which he relies on as relevant; his opponent in turn may say that there are other relevant factors pointing in the other direction — and those are for him to prove.
>
> We stress, however, that the question of what is just will inevitably be one of impression and discretion in most cases and that the question of discharging any burden of proof or persuasion will seldom be a central consideration.

**[25]** I pause here for a moment. I have this to say. That the plaintiffs are seeking leave to amend under O 20 r 5(3), (4) and (5) of the RHC must satisfy two basic

requirements. Firstly, that the facts of the case remain the same or substantially the same. Secondly, that the justice of the case are with the plaintiffs. Both of these two requirements must be satisfied to the brim (see *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793).

**[26]** It is interesting to note that the proposition of the law as stated in *Lim Yong Swan v Lim Jee Tee & Anor* was vigorously applied by our Court of Appeal in the case of *Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359.

**[27]** LP Thean JA in *Chan Mui Eng & Ors v Chua Chu Huwe & Anor* [1994] 1 SLR 375 laid down the following principles of law that should be reproduced here. At pp 380–381, LP Thean JA said:

> The next question is whether leave should be granted in this case to include a claim when the application for amendment was made after the expiry of the period of limitation 'current at the date of the issue of the writ' in respect of that claim. I came to the conclusion that in these circumstances leave to amend ought not to be granted because if such amendment was allowed it would have retrospective effect as from the date of the writ and would deprive the second defendants of a defence in law. In *Mabro v Eagle, Star And British Dominions Insurance Co Ltd* [1932] 1 KB 485, at p 487, Scrutton LJ said:
>
> > … In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence.
>
> There, the plaintiffs, who had no interest in the matter, instituted an action against the insurance company in respect of the cargo on board the ship Berkshire which cargo was condemned by the Greek government on the ground that it was for the use of the forces of Turkey with which Greece was at war. The claim was originally made in 1923 and the writ was issued in 1925. In 1931 an application was made to join the party who was said to be the person really interested in the insurance. By then the period of limitation had expired. The application was disallowed.

**[28]** Continuing at pp 381–382 of the report, his Lordship observed that:

> The courts in England have adopted a strict approach in dealing with an application for adding a party or adding a claim where the relevant period of limitation in respect of the claim against a party has expired and the amendments do not fall within the provisions of O 20 r 5(3), (4) or (5). In general, leave would not be granted.

**[29]** Perhaps the questions to pose, relevant to the occasion at hand, would be this:

(1) what is the new cause of action in the present case?

(2) whether that new cause of action arises out of the same or substantially the same facts as the cause of action in respect of which relief has already been claimed in the said action?

**[30]** In order to answer these two questions, I must refer, once again, to the relevant authorities. As regards the meaning to be attached to the phrase 'cause of action', Abdul Hamid Omar, Acting Lord President, in *Hock Hua Bank Bhd v Leong*

*Yew Chin* referred to the case of *Letang v Cooper* [1965] 1 QB 232, at pp 242–243 where Lord Justice Diplock defined it to mean 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another.' In *Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors*, the Judicial Commissioner defined the phrase 'cause of action' in this way:

> Secondly, it is necessary to state the meaning and content of the term 'cause of action'. It may mean one thing for one purpose and something different for another. The meaning depends on the context in which it is used.
>
> A cause of action has been defined as the facts which the plaintiff must prove in order to get a decision in his favour. This definition stresses the factual aspect of the claim; namely, all material facts the plaintiff must establish. It is this concept which is envisaged by O 18 r 7 which requires the pleading to 'contain and contain only the material facts on which a party pleading relies for his claim'. Scott LJ in *Bruce v Odhams Press Ltd* at p 712 said that the word 'material' means necessary for the purpose of formulating a complete cause of action; and if anyone 'material' fact is omitted, the statement of claim is bad'. The words 'same facts' or 'substantially the same facts' in O 20 r 5(5), in my view, refer to the factual situation of the case.

**[31]** And the Judicial Commissioner in that case decided that no factual circumstances was pleaded in respect of the new cause of action. This was what he said:

> No factual circumstance was pleaded in connection with s 76 of the Act. Unlike the pleadings in this case, the case of illegality under s 54 of the Companies Act 1948 had been properly pleaded in the *Belmont case* (1979) Ch 250. The main missing link there was knowledge. What the plaintiffs in this case sought to do was to introduce a new factual circumstance in the guise of particulars after time had run out under the Limitation Act. They had pleaded 'constructive trust' as a relief based on breach of fiduciary duties of directors. The factual circumstance in support of an offence under s 76 of the Act and the relief of constructive trust is very different from that relating to breach of fiduciary duties of directors.

**[32]** The Judicial Commissioner went on to say:

> A party asking the court to exercise a discretionary power in his favour must place some material and advance some cogent reasons to impel the court to lean on his side: see Ratnam v Cumarasamy. In the Belmont case it was clear that depositors' moneys in the company had first been channeled out under the pretext of the purchase of Maxim shares. The moneys then went into the hands of the shareholders of Belmont and not the company. In the end, the depositors were unjustly deprived of their moneys. The justice was clearly on the side of the depositors. In the present case the plaintiffs, who in effect were the debenture holders, failed to discharge the onus on them to demonstrate that the justice of the cause rested with them.

Finally, the Judicial Commissioner said:

> There was no explicable reason why the plaintiffs in the present case took seven years to raise the point when the point, if there was one, should have been so obvious in the early stages of the proceedings. The case the plaintiffs sought to present was inextricably founded on the

equitable principles of fiduciary duties and constructive trust. Delay defeats equity. In this case there was inordinate delay. The overall equities were clearly not with them. I therefore exercised the discretion against the plaintiffs.

**[33]** In *Steamship Mutual Underwriting Association Ltd & Ors v Trollope & Colls Ltd & Ors* [1986] 2 Const LJ 224, Judge John Newey QC defined 'cause of action' in this way:

> Neither the 1980 Act nor the rules define 'cause of action'. In *Cooke v Gill* (1873) LR 8 CP 107, in which the question was whether a cause of action had arisen within the jurisdiction of the *Mayor's and City of London Court*, Brett J said at p 116:
>
> > Cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have to traverse.
>
> In *Reed v Brown* [1889] 22 QBD 128, at p 131, CA, which was also concerned with the jurisdiction of the *Mayor's Court*, Lord Esher MR (as Brett J had now become) affirmed this description, while rewording it slightly.
>
> A similar description of cause of action was given by Diplock LJ (as he then was) in *Letang v Cooper* [1965] 1 QB 232 CA, in which a plaintiff attempted unsuccessfully to avoid the three years limitation period applicable to actions for negligence or breach of duty. He said at p 242:
>
> > A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.
>
> In *Conquer v Boot* [1928] 2 KB 336 a plaintiff, having succeeded in obtaining damages from a defendant for breach of contract to complete a bungalow 'in a good and workmanlike manner', brought a second action in respect of the same bungalow, but adding to the description of his claim, the words 'with proper materials.' The Court of Appeal held that the plaintiffs' cause of action was the same in both actions and, the question having been decided in the first, the matter was res judicata.
>
> In *Brickfield Properties Limited v Newton* [1971] 1 WLR 862 developers had employed architects to act as such in connection with the erection of six blocks of flats. Subsequently the developers issued writs against the architects claiming 'damages for negligence and breach of duty in supervising the building of the … flats' and followed them with statements of claim which included allegations of negligent. The architects applied to strike out the design allegations as being contrary to O 18 r 15. The Court of Appeal accepted that negligence in design and negligence in supervision raised different causes of action, but decided that, since they arose out of substantially the same facts, the developers should be allowed to amend their writ under O 20 r 5, so as to add negligent design, Cross LJ said at p 880:
>
> > It is no objection to amendment under O 20 r 5(5) that some of the facts out of which the new cause of action arises are peculiar to it and that some of the facts out of which the old cause of action arises are peculiar to it. It is enough if the overlap is so great that the new cause of action can fairly be said to arise out of substantially the same facts as the old cause of action.

**[34]** And based on the facts of the case, Judge John Newey QC decided the case in this way:

> Mutual's writ in this case was widely worded. It covered claims for damages in contract, for breach of duty and for negligence arising out of works at Aquatical House, air conditioning was mentioned specifically, but only as one among other parts of the works.
>
> Mutual's statement of claim had to state specifically the remedy which they sought and particulars to support it in order to comply with O 18 rr 12(1) and 15(1). The statement of claim in both its original and amended form related only to air conditioning. I think that the effect of it was to narrow Mutual's causes of action as described in *Cooke*'s, *Read*'s and *Letangs*' cases so that they become confined to breaches of contract concerned with air conditioning and of negligence resulting in damage to the air conditioning. This was I think a consequence of the rules, but could also be described as 'abandonment'.
>
> I think that Mutual's proposed reamendments to the statement of claim would, if allowed, add new causes of action for breaches of contract, statutory duty and in negligence to the brickwork.
>
> The case is very different from *Conquer*'s, which was concerned only with defects in the erection of a small dwelling. The work of design and installation of air conditioning and the selection of materials for new brickwork in a large building are very different, as is shown by the involvement of mechanical sub-contractors and engineers in the former and civil engineers in the latter. If Mutual had succeeded in an action against Trollope and Newman concerning defects in the central heating and had afferivarels brought a second action against them relating to the brickwork, although Trollope were the general contractors and Newman architects for the whole building, it is, I think, inconceivable that they could have been met with a successful plea of res judicata.
>
> I think, therefore, that the proposed amendments would be 'new claims' within s 35(2) of the 1980 Act and that, if they can be allowed at all, it must be under O 20 r 5(5). This involves a consideration of the existing amended and proposed reamended statement of claim to decide whether there is a sufficient 'overlap' to use Cross LJ's description in *Brickfield*, between the facts relied upon to support Mutual's air conditioning claim and their proposed brickwork claim, so that they can be said to arise out of the same or substantially the same facts.
>
> The duties relied upon in relation to air conditioning and brickwork are substantially the same, but the application of those duties, the breaches of them, and the damages consequent upon them seem to me to be substantially different. What is 'overlap' must inevitably be a question of degree. In my opinion there is insufficient overlap to warrant giving leave for the re-amendments. I, therefore, have no discretion in the matter.

**[35]** It is pertinent to mention that the decision of Judge John Newey QC in that case was confirmed by the Court of Appeal with a coram of May LJ, Lloyd LJ and Caulfield J, (see *Steamship Mutual Underwriting Association Ltd & Ors v Trollope & Colls Ltd & Ors 6 Con LR 11,* [1986] 2 Cons LJ 224, 33 Build LR 77).

**[36]** Now, on the question of whether the amendments sought to be pleaded arose out of the same or substantially the same facts, reference to the case of *Tabarrok v EDC Lord & Co (a firm)* The Times 14 February 1997 (Transcript: Smith Bernal) should be made. That was a decision of the Court of Appeal with a coram of Hirst, Aldous, Schiemann LJJ. Writing a separate judgment, Aldous LJ said and concluded as follows:

I accept that the causes of action pleaded and sought to be pleaded arise out of the same facts. However, the negligent advice took place in 1987. It was not until 1995 that the respondents became aware of the claim sought to be added by way of amendment. Further, the facts that are sought to be pleaded do not arise out of similar facts. The differences are such that it cannot be said that they are substantially the same. There is a real difference between considering the case pleaded by Coolrise and that pleaded by the appellant or sought to be pleaded by the appellant, in which he seeks to widen the claim, not only in respect of the instructions that he alleges he gave, which Coolrise carried out, but also in relation to the bank guarantee. I have therefore come to the conclusion that the judge came to the right conclusion on the question as to whether the matters that arose out of the facts are substantially the same. In those circumstances, I believe he came to the right conclusion in refusing the amendment. Having regard to that conclusion, it is not necessary for me to go on and consider whether an amendment would be just. I would dismiss the appeal.

**[37]** All these propositions of law by these other judges were certainly of great help in adjudicating the defendant's appeal in encl 35 (now encl 27). Having garnered the relevant principles of law from these other judges, I can safely itemise the following requirements which had to be fulfilled by the plaintiffs in seeking to amend the statement of claim:

(1) That the new cause of action arises out of the same or substantially the same facts as the cause of action in respect of which relief had already been claimed in the original action.

(2) In considering the question of whether it is just to grant leave to make the amendment, the court must be vigilant and must weigh in a balance between the applicant's need to amend as against the prejudice which the opposing party's interest may suffer.

(3) In determining the applicant's need to amend, the court is entitled to take into consideration the following factors:

(a) If the applicant's existing claim is bound to fail, that may be the barometer to use as it may possibly be relevant to show where the justice of the case lies.

(b) If the applicant's existing claim is bound to succeed, that could conceivably be relevant in deciding whether to allow a different cause of action leading to the same remedy but requiring further cogent facts to be pleaded. I take note of the fact that it is difficult to imagine how a defendant could possibly put forward this as a reason to object for leave to be given to the applicant.

(c) If the new claim of the applicant is bound to fail, then leave should be refused forthwith by applying the ordinary principles of law.

(d) If the new claim is bound to succeed, that may affect the justice of the case.

(4) In an evenly balanced case, it is for the applicant to satisfy the court that it is just to grant leave to amend based on what Staughton LJ had said in the case of *Hancock Shipping Co Ltd v Kawasaki Heavy Industries Ltd The Casper Trader* [1992] 3 All ER 132, CA, at p 137:

> If the court concludes that it cannot decide whether or not it is just to allow the amendment, the party applying for leave must fail. The burden of persuasion lies on him, and if it is not discharged his application should not succeed.

(5) What is said to be just would inevitably be dependent on the judge's impression and discretion.

**[38]** Having stated the law, I shall now proceed to examine the proposed amendments to the statement of claim. In my judgment, on perusal of the proposed amendments to the statement of claim there were new causes of action which did not satisfy the requirements as alluded to by me earlier. The new causes of action may broadly be categorised as follows:

| New causes of action | Paragraphs in the proposed amended statement of claim raising new causes of action |
|---|---|
| (1) Breach of statutory duty | Paragraphs 9A, 10A, 10C, 10F, 10H, 17A, 19, 22A, 23A, 25 and the particulars of the breach of statutory duty. |
| (2) Misfeasance of public office | Paragraphs 10D, 10E, 10F, 10G, 10H, 10I, 19A, 19B, 22A, 22B, 23A, 25 and the particulars of misfeasance of public office. |
| (3) Negligence | Paragraph 25 under particulars of negligence in items (a), (b), (c) and (r). |

**[39]** In my judgment, the new causes of action as particularised above did not arise out of the same facts or substantially the same facts and neither was there any sufficient overlap of the facts. In the circumstances, it would not be just to grant leave to make the proposed amendments to the statement of claim.

## BREACH OF STATUTORY DUTY

**[40]** I shall not reproduce verbatim the causes of action in the original statement of claim as well as in the proposed amendments. They would take a lot of space in this judgment. Suffice to say that they can all be found in the re-constructed file.

**[41]** Now, the issue of the breach of statutory duty was only averred in para 25 of the original statement of claim where it stated that:

> By reason of the matters aforesaid, the defendant has acted in breach of their statutory duty.

**[42]** It must be borne in mind that no reference whatsoever was made in the original statement of claim in regard to the relevant statute which relates to para 25 of the original statement of claim. The breach of statutory duty as stated in para 25 of the original statement of claim refers to the preceding paragraphs before para 25 because the opening words of para 25 states as follows:

> By reason of the matters aforesaid …...

**[43]** A closer look at para 10 to para 24 of the original statement of claim revealed the following salient facts:

(a) that the defendant had represented that the works would be completed by September 1997;

(b) when making the representation and carrying out its design and the works, the defendant had in its contemplation the businesses and/or properties of the plaintiffs; and

(c) when making the representation and carrying out its design and the works, the defendant reasonably foresaw that the plaintiffs or any of them and their respective businesses or the properties of the plaintiffs would suffer injury, loss and damage.

**[44]** The facts as pleaded in para 10 to para 24 of the original statement of claim as summarised above merely relates to the purported representation of the completion date and the manner in which the defendant had carried out its design and the works.

**[45]** Whereas in the proposed amendments to the statement of claim, the plaintiffs had for the very first time pleaded that the defendant had breached their duties under the following statutes and the particulars thereof were stated under caption:

> Particulars of breach of statutory duty' in para 25 of the proposed amendments to the statement of claim as follows:
>
> (a) section 22 of the Federal Territory (Planning) Act 1982;
>
> (b) section 22 (2) of the Town And Country Planning Act 1976; and
>
> (c) section 5 of the Street, Drainage And Building Act 1974.

**[46]** In order to support the new causes of action for the breach of the statutory duty, the plaintiffs sought to amend paras 9A, 10A, 10C, 10F, 10H, 17A, 19, 22A, 23A and 25 in the following fashions:

(a) that the defendant has a statutory duty arising from s 22 of the Federal Territory (Planning) Act 1982 (averment at para 9A);

(b) that when planning and/or approving the plans, the defendant was aware of the existence of the plaintiffs (averment at para 10A);

(c) that the defendant has a duty of care arising from the statutory duties (averment at para 10C);

(d) that the right to commence works was conditional upon and subject to the proper exercise of the defendant's discretion and power to plan (averment at para 10F);

(e) that the matters relating to planning and the approval of the relevant plans were raised in paras 10H and 17A; and

(f) that the breach of statutory duty connected to the planning and the approval of the plans were raised in paras 19, 22A, 23A and 25.

**[47]** It was part and parcel of my judgment that the issues of planning and the approval of plans were totally different and distinct cause of action and which was never pleaded in the original statement of claim. In regard to the breach of a statutory duty, there is a passage appearing in *Clerk & Lindsell on Torts* (18th Ed) at p 599 which merits reproduction. It is this:

> In English law this is a specific common law action which is distinct from the tort of negligence, even where the negligence action is based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it. The careless performance of a statutory duty does not in itself give rise to any cause of action in the absence of either a right of action for 'breach of statutory duty simpliciter' or a common law duty of care in negligence. The question, then, is when will breach of a statute give rise to an action for damages at common law?

**[48]** And at pp 600–601 of the same textbook, the following passages merit reproduction and I shall reproduce them now:

> Essentials of the action Much of this chapter is taken up with determining when breach of a statutory standard gives rise to an action in private law for breach of statutory duty. The construction of each statute turns ultimately on its particular wording and it is difficult to formulate principles of general application. It is possible here only to give broad guidelines as to how the courts are likely to react to particular types of legislation. Once the question of whether the statute is ever actionable in private law has been determined, there are four further issues that must be considered:
>
> (1) The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficient simply that the loss would not have occurred if the defendant had complied with terms of the statute. This rule performs a function similar to that of remoteness of damage.

**[49]** Put in another way, for a cause of action for breach of a statutory duty, it must be proved that the statutory duty was breached and that the workings of the statute must be considered to determine whether there is any liability. I must reiterate that the original statement of claim had not made any reference to any statute or to any provisions of any statute or to any alleged breach. Furthermore, the facts as pleaded in paras 10 to 24 of the original statement of claim did not support the allegations of the breach of the statutory duty under s 22 of the Federal Territory (Planning) Act 1982 or under s 22(2) of the Town And Country Planning Act 1976 or under s 5 of the Street, Drainage And Building Act 1974 simply because the issues in regard to

the planning or to the approvals of the plan were not raised, at all, in the original statement of claim. Incidentally, the facts relating to the planning and the approvals of the plan as stated in s 22 of the Federal Territory (Planning) Act 1982 and s 22(2) of the Town And Country Planning Act 1976 and the alleged breach of the statutory duty under those sections would require a completely different facts from that pleaded in the original statement of claim. It was for these reasons that the proposed amendments to include the new cause of action for breach of the statutory duty and the new facts relating to the cause of action for breach of the statutory duty ought not to be allowed. It must be borne in mind that s 5 of the Street, Drainage And Building Act 1974 merely sets out the 'power' of the defendant to lay out and make new streets and to enlarge, widen or otherwise improve any public street. Unfortunately, the power of the defendant to lay out and make new streets and to enlarge, widen or otherwise improve any public street was never raised by the plaintiffs in the original statement of claim. What was essentially raised in the original statement of claim was merely the manner in which the 'designs and works were carried out.' I must categorically hold, for these reasons, that leave to amend the original statement of claim to include the claim for breach of statutory duty ought not to be allowed as it would not be just to grant leave.

**[50]** I say that in deciding whether it was just to grant leave to amend, this court was entitled to consider and may consider whether the proposed amendments were completely futile. In my judgment, the proposed amendments to include the breach of the statutory duty under s 22 of the Federal Territory (Planning) Act 1982, s 22(2) of the Town And Country Planning Act 1976 and s 5 of the Street, Drainage And Building Act 1974 were futile exercises and they were bound to fail for the following reasons:

(1) that planning permission was not required for the works identified in the statement of claim;

(2) since the works described in the proposed amendments did not require planning permission, it was difficult to understand as to how the defendant could owe the plaintiffs a duty under s 22 of the Federal Territory (Planning) Act 1982 as well as under s 22(2) of the Town And Country Planning Act 1976; and

(3) that s 5 of the Street, Drainage And Building Act 1974 merely empowers the defendant to construct new streets or to improve any public street and it does not establish a duty of care on the part of the defendant towards the plaintiffs.

**[51]** It would be germane at this juncture to refer, once again, to the case of *Lim Yong Swan v Lim Jee Tee & Anor*. There, the Court of Appeal of Singapore disallowed leave to amend the statement of claim on the ground that such an amendment was futile. At p 511 of the report, Yong Pung How CJ (Singapore) concluded his judgment by saying that:

> There was therefore no contract in existence, in the sense stated above, at the time of the declaration and accordingly no room for special condition B or the doctrine of frustration to operate. This court in Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1990] 2 MLJ 65 held that leave to amend a defence should not be granted where the amendment raises no reasonable defence to the claim. We were of the view that the same applies to applications

for leave to amend a statement of claim. As the new causes of action did not raise any reasonable causes of action, the appellant also succeeded on her alternative ground.

*Appeal allowed*

MISFEASANCE OF PUBLIC OFFICE

**[52]** It must be emphasized that the cause of action relating to misfeasance of public office was raised for the very first time in the amended statement of claim. The facts relating to misfeasance of public office as pleaded in paras 10D, 10E, 10F, 10G, 10H, 10I, 19A, 19B, 22A, 22B, 23A, and 25 of the amended statement of claim and the particulars set out therein revealed facts which were separate and distinct from the facts raised in the original statement of claim. *Clerk & Lindsell on Torts* (18th Ed) at p 917 carries a good write-up on the subject matter in question. There the learned authors wrote:

> An action in the tort of misfeasance in public office will lie against any public authority, such as a local council or government department, and against any individual public officers. When an action is brought against a collective public body, such as a local council, it is enough to show that the majority acted either on the basis of express malice or with knowledge of the unlawful nature of the action and foresight of injury to the plaintiff (*Jones v Swansea City Council* [1990] 1 WLR 1453).

**[53]** And I would gratefully adopt them in adjudicating the defendant's appeal in encl 35 (now encl 27) and I must say that the relevant facts that ought to exist in order to establish the tort of misfeasance of public office would be:

(1) malice;

(2) knowledge of the unlawful nature of the action; and

(3) foresight of injury to the plaintiff.

**[54]** According to Sir Richard Scott VC in the case of *Elliott v Chief Constable of Wiltshire & Ors* (The Times, 5 December 1996) that if malice, intention to cause harm, improper purpose and damage were proved at the trial, then the tort would be established. That would be the law provided the facts would support it. Here, in the original statement of claim the plaintiff had merely pleaded those facts in paras 10–24 which were related to representation of the completion date and the manner in which the design and works were carried out. Based on the pleadings in the original statement of claim, the plaintiffs' claim was founded on negligence and nuisance as can be seen in paras 27 and 28 of the original statement of claim. The original statement of claim was poorly drafted and it lacked the requisite details on the subject of misfeasance of public office. In fact, the issue of malice or unlawful nature of the defendant's action which would, in law, constitute the tort of misfeasance in public office was not pleaded at all in the original statement of claim. The proposed amendments advanced by the plaintiffs which the plaintiffs alleged to constitute misfeasance of public office of raising new facts to show that the defendant had recklessly allowed the commencement of works without taking reasonable and expedient steps to conduct the necessary surveys and studies were in sharp contrast to what had been pleaded in the original statement of claim. A perusal of the

pleadings of the plaintiffs in the original statement of claim, both in respect of the facts and the relief sought, would show that the facts relating to misfeasance of public office was substantially based on different facts and that there was no sufficient overlap of the facts at all.

NEGLIGENCE

**[55]** I cannot help but say that the plaintiffs had raised new issues as to negligence as found in the particulars of negligence as pleaded in para 25 under items (a), (b), (c) and (r) of the particulars of negligence. In the proposed amendments, the plaintiffs sought to introduce the following factors:

(a) failing to exercise the plaintiffs' legitimate expectation that the defendant would carry out all reasonable and necessary due diligence in conducting the necessary geological surveys and the studies thereof (see the averment at para (a));

(b) failing to perform a due diligence survey and/or study of the utilities structures in the vicinity of the works and the lands adjoining the works (see the averment at para (b));

(c) failing to properly consider the proposed plans (see the averment at para (c)); and

(d) the averment at para (r) that further particulars would be disclosed at the trial proper.

**[56]** It was quite obvious that the negligence sought to be adduced by the plaintiffs in the proposed amendments were based on substantially different facts which were not pleaded earlier. The new cause of action relating to negligence as set out above ought not to be allowed after the time period for limitation had expired.

**[57]** In contract law, negligence may be alleged as part of the cause of action but as a cause of action it ranks, in itself, as a tort. Since damage to a particular plaintiff is an ingredient in an action for negligence, the cause of action arises when the damage arises. In claims for negligence in connection with the construction or repair of buildings, damage may in fact occur at a given point of time but not discoverable until much later or the damage in itself may be deferred until some time after the breach of duty had happened and if that happens it will be converted into a full cause of action. Briefly, that would be the law but everything being equal the law of limitation must curtail an indolent plaintiff, like the present plaintiffs, from seeking redress in a court of law.

NO URGENT REASON AND NO EXPLANATION FOR THE DELAY

**[58]** In exercising the discretion to grant leave to amend, the plaintiffs ought to give good reasons as to the delay in filing the present application to amend (*Multi-Pak Singapore Pte Ltd (in receivership) v Intraco Ltd & Ors*). The plaintiffs sought to explain the delay in filing the application to amend by relying on the

explanation as found in para 4 of the affidavit no 5 affirmed by Anuar bin Itam on 21 March 2002 which was worded as follows:

> The plaintiffs have as before this commenced an action in relation to this matter in Suit No S1–22–499 of 1998 between the plaintiffs and three others. The case management was fixed for hearing on 1 April 2002 and our solicitors are now preparing for the same. I was advised and verily believe that in the process of discovery and getting up for the case, we have discovered that there are many matters which required an application to amend the writ of summons and the statement of claim in order to allow all the disputed issues between the parties to be decided by this honourable court. In the interest of justice, all the issues between the parties ought to be finally decided at the trial.

**[59]** With respect, I cannot accept such an explanation because the discovery of the documents in Civil Suit No S1–22–499 of 1998 was conducted before November 2000 whilst the present application to amend was only filed on 26 March 2002. Apart from stating that the discovery of the documents involved voluminous materials, nothing else was being stated in the plaintiffs' affidavit as to how the documents were relevant to the present case which necessitated the filing of the present application to amend. Furthermore, the plaintiffs' own expert by the name of HCL Associates (Australia) Pte Ltd had prepared the expert report dated November 2000 and the expert report was based on the documents obtained after discovery which must have been before November 2000. Nothing was deposed in the plaintiffs' affidavit to indicate how these documents which were discovered prior to November 2000 were relevant to the cause of action for breach of statutory duty and misfeasance of public office.

**[60]** It was wrong to say that the proposed amendments were merely re-arrangement and refinement of the causes in the original statement of claim. On the contrary, the proposed amendments which brought into the picture new causes of action were not raised at all in the original statement of claim. The proposed amendments to the amended statement of claim were definitely not based on the same facts or substantially the same facts as in the original statement of claim.

**[61]** In the affidavit-in-reply affirmed by Mak See on 22 April 2002 as seen in encl 22, the defendant in challenging the proposed amendments categorically stated as follows (the relevant averments only):

> 6 Moreover, the plaintiffs did not provide any explanation as to what are the matters that were only known during the process of discovery and preparing for Civil Suit No S1–22–499 of 1998 that the plaintiffs were not able to know prior be it from Civil Suit No S1–22–499 of 1998 or otherwise which caused the need to amend the original writ of summons and statement of claim and the plaintiffs' application to amend the original writ of summons and statement of claim was only made after about two (2) years. Furthermore no reason whatsoever was given by the plaintiffs as to why this action was filed separately from Civil Suit No S1–22–499 of 1998.
>
> 7 Further thereto, from the plaintiffs' expert report, that is HCL Associates (Australia) Pty Ltd dated November 2000 produced in exh 'AI-1' to the affidavit No 2 of Anuar bin Itam affirmed on 23 February 2001 filed by the plaintiffs in this action to oppose the defendant's application to strike out the original writ of summons and statement of claim, it is clear that discovery had been carried out even before November 2000,

whereby it is only proper for the plaintiffs to explain the delay in filing the plaintiffs' application to amend the original writ of summons and statement of claim.

8 I am also advised by the solicitors for the defendant which I verily believe that the amendments in the amended writ of summons and statement of claim are amendments based on facts that should have been known by the plaintiffs when this action was commenced and no circumstances whatsoever was raised by the plaintiffs to show that the facts upon which the amendments in the amended writ of summons and statement of claim were made are facts which could only be known during the process of discovery and preparing for Civil Suit No S1–22–499 of 1998.

**[62]** And flowing from all these, it can safely be said that the plaintiffs had failed to give any explanation in their subsequent affidavits in regard to the issue of delay and in the absence of such an explanation, there was no material before the court to weigh in a balance the proposed amendments as suggested by the plaintiffs. The delay must therefore be construed to be fatal.

THE NEW ORDER 1A OF THE RHC

**[63]** It was urged upon me to vigorously apply the new O 1A of the RHC for the benefit of the plaintiffs. But I was of the view that the new O 1A of the RHC cannot be applied to the present case at hand because the defendant was not raising any preliminary objection for the non-compliance of any of the rules of the RHC. Based on the settled proposition of the law, this court should not exercise its discretion under O 20 r 5(5) of the RHC to allow the proposed amendments sought for by the plaintiffs' after the limitation period has set in. It was not the defendant's case that the proposed amendments ought not to be granted for technical non-compliance of the rules of the RHC. That being the case, the invitation to invoke the new O 1A of the RHC was certainly misplaced.

ORDER 20 R 5(5) OF THE RHC

**[64]** In challenging the proposed amendments, the defendant's stand was that the limitation period had expired and that the plaintiffs were seeking to introduce new causes of action in the proposed amendments. I have taken into account the following principles of law:

(1) that amendments can be made at any stage of the proceedings including at the trial (*Andrew Chioh Eng Hua & Anor v Kewangan Utama Bhd* [1998] MLJU LEXIS 925);

(2) that the court will allow such amendments as will cause no injustice to the other parties (*Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213); and

(3) that if the application is allowed the opposite party will normally be compensated by way of costs.

**[65]** But the cases relating to the following facts on amendments ought to be distinguished:

(a) cases on general principle relating to amendments;

(b) cases relating to amendments of the statement of defence;

(c) cases where time bar are not in issue; and

(d) cases where amendments are sought to be made before trial and cases where amendments are sought during trial and before judgment.

**[66]** At this juncture, it would be ideal to distinguish *Andrew Chioh Eng Hua & Anor v Kenangan Utama Bhd* and *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors*. In the former case, an application was made by the defendants there to amend the defence and the issue of raising new causes of action after limitation has set in was not in issue. In the latter's case — referring to *Yamaha Motor*, the following distinguishing features may be stated:

(1) This case involved an amendment which was sought pursuant to O 20 of the RHC.

(2) The Federal Court in Yamaha Motor did not specifically expound the principle of law regarding O 20 r 5(5) of the RHC. In fact, the Federal Court merely re-stated the general principles of amendments and relied on the case of *Kam Hoy Trading v Kam Fatt Tin Mine* [1963] MLJ 24 which was a case that was not decided on the basis of O 20 r 5(2)–(5) of the RHC.

(3) At p 214 of the *Yamaha Motor*'s case, the Federal Court stated that:

> Under O 20 of the Rules of the High Court 1980, which is equivalent to O 28 of the Rules of the Supreme Court, a judge has a discretion to allow leave to amend pleadings. Like any other discretion it must of course be exercised judicially (see *Kam Hoy Trading v Kam Fatt Tin Mine*). The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side can be compensated by costs; and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

And from the aforesaid passage, it is evident that Yamaha Motor had laid down principles relating to the general principles of amendment and not principles which specifically relate to amendment under O 20 r 5(5) of the RHC.

(4) The three basic tests propounded by Yamaha Motor relate to the general principles of amendment to pleadings and they are not specific tests which are applicable to an application to amend under O 20 r 5(5) of the RHC.

(5) The principles of law for an application to amend under O 20 r 5(5) of the RHC as stated in *Lim Yong Swan v Lim Jee Tee & Anor*; *Government of Malaysia v Mohamed Amin bin Hassan*; *Hock Hua Bank Bhd v Leong Yew Chin*; and *Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor* would be more relevant to apply.

(6) The case of *Kam Hoy Trading v Kam Fatt Tin Mine* which was cited in Yamaha Motor was a case where leave to amend was granted after the close of the case but before judgment.

(7) In regard to the amendments in *Yamaha Motor* which included 'fraud' or 'conspiracy' after the expiration of the limitation period, the Federal Court merely relied on the provisions of O 20 r 5(5) of the RHC and based on the facts in *Yamaha Motor* had decided that (see p 215 of the report):

> In alleging 'fraud' or 'conspiracy' in the proposed amendment, we are of the view that having regard to the original amended statement of claim, the appellants have not in effect, turned the original claim which is for an order to declare the 1977 debenture null and void for lack of consideration, into a claim of another and inconsistent character. From the very beginning, the appellants' claim is that there was in fact no debt at all due from the first respondent to the second respondent giving rise to any legal right to create the 1977 debenture and charge. By the proposed amendment, the appellants merely allege that as there was no money due between the two parties, the debenture was created as a result of conspiracy or fraud by the first and second respondents and others. The alleged conspiracy or fraud is, to our mind, a mere extension of the allegation that the debenture is null and void for lack of consideration. Indeed on the facts of the present case, even if the allegation of fraud can be held to constitute a new cause of action, the amendment is allowable under O 20 r 5(5) as it arises out of the same facts or substantially the same facts as the original cause of action in which the relief has already been claimed by the appellants in the original pleading.

**[67]** In short, the Federal Court in *Yamaha Motor* decided that the new cause of action where the allegations of 'fraud' and 'conspiracy' were raised, was a mere extension of the allegation that the debenture was null and void for lack of consideration which was pleaded in the original statement of claim.

**[68]** I will now say something about the case of *Palaniappan v Universiti Pertanian Malaysia* [1995] 1 MLJ 353. That was the case where an employee sued the employer for wrongful dismissal. The plaintiff's claim was amended by the first amendment to substitute a claim for 'general damages for the wrongful dismissal' instead of the earlier prayer for a declaration that the plaintiff's dismissal was without just cause. Subsequently, by way of the fourth application, the plaintiff sought for the following reliefs:

(a) a declaration that the plaintiff's dismissal was wrongful and without just cause or excuse;

(b) general and special damages for wrongful dismissal and/or reinstatement with all the fringe benefits; and

(c) further facts were also sought to be added in order to establish wrongful dismissal.

**[69]** The court in *Palaniappan*'s case decided at p 361 that:

> Rule 5(5) of O 20 therefore only applies if the following conditions are present:
>
> (a) a new cause of action is added or substituted;
>
> (b) the new cause of action arises from the same facts or substantially the same facts as the cause of action in respect of which relief had already been claimed;

If the proposed amendments do not fulfill either of these two requirements, no amendments will be allowed under r 5(5).

**[70]** The court in *Palaniappan*'s case had also decided that the only issue in the said case was in respect of wrongful dismissal and that the plaintiff, in all his successive amendments, continue to challenge his dismissal. Based on this proposition, the court held that: This is not a case of the plaintiff, in his proposed amendments, seeking to bring an entirely different action against the defendant, or changing the character of the cause of action or relief.

**[71]** The court in *Palaniappan*'s case had also decided that the question of whether to allow or disallow an application for amendment under O 20 r 5(5) of the RHC was essentially a question of fact. At p 376, this was what the court stated:

> The determination of this issue is essentially a question of fact. Whilst earlier decisions may provide some useful guidelines, each case has to be considered on its own facts. As was pointed out by the English Court of Appeal in the recent case of *Welsh Development Agency* [1994] 4 All ER 10 per Glidewell LJ at p 29, referred to above whether or not the new cause of action arises out of substantially the same facts as the already pleaded is substantially a matter of impression.

**[72]** In *Palaniappan*'s case, the court was also persuaded by the fact that greater injustice would be occasioned to the plaintiff as an employee and the court said that:

> As indicated by the cases referred to by the plaintiff's counsel, this area of the law, particularly that relating to the remedies available under public law, as opposed to private employment law, is not free from uncertainties.

**[73]** In an attempt to convince me that the proposed amendments ought to be granted, the plaintiffs cited an array of authorities. I would, out of deference to the learned counsel for the plaintiffs, say something about these authorities:

(1) The case of *GL Baker Ltd v Medway Building And Supplies Ltd* [1958] All ER 540, was a case of an application to amend the statement of defence and the issue of limitation of the causes of action did not arise at all.

(2) In *M-Fold Development Sdn Bhd v Altrue Sdn Bhd* [2002] MLJU 71, I had occasion to deal with an application to amend the statement of defence. The issue of limitation was not raised. At p 49 of the report, I had this to say:

> The courts have always been magnanimous in allowing amendments to the pleadings. It must be borne in mind that the proposed amendments did not add nor substitute a new cause of action.

(3) In *Tildesley v Harper* [1878-79] 10 Ch D 393, the court was concerned with an application to amend the statement of defence and the issue of limitation was not ventilated.

(4) In *Ketteman & Ors v Hansel Properties Ltd* [1988] 1 All ER 38, the court was concerned with an application to amend the statement of defence at the end of the trial and the court refused to grant it. The issue of limitation of the causes of action did not arise.

(5) In *Ribuwajar Development Sdn Bhd v Ratus Mayang Sdn Bhd* [2001] MLJU 693, an application to amend the statement of claim and the issues of limitation and invocation of O 20 r 5(5) of the RHC did not arise. Based on the facts, the court held that even with the proposed amendments the nature of the claim remained the same.

(6) In *Chaw Anui v Tan Kim Chai* [2001] MLJU LEXIS 595, was a case of an application to amend the petition for divorce and the issues of limitation and invocation of O 20 r 5(5) of the RHC did not arise for consideration.

(7) In *Abdul Johari bin Abdul Rahman v Lim How Chong & Ors* [1997] 1 MLJ 629, the court was concerned with an application to amend the statement of defence and the counter claim and the issues of limitation and invocation of O 20 r 5(5) of the RHC did not arise.

(8) In *Chin Kok Kwong Construction Sdn Bhd v Sunrise Towers Sdn Bhd* [1986] 2 MLJ 41, the court was concerned with an application to amend the statement of claim and the court refused to allow the amendment pursuant to O 20 r 5(5) of the RHC because the new cause of action did not arise out of the same facts or substantially the same facts as the cause of action in the original statement of claim.

**[74]** Approaching the defendant's appeal in encl 35 (now encl 27) with care and circumspection, I must categorically say that a mere reference to the 'breach of statutory duty' did not mean that the cause of action had been pleaded. A careful perusal of the facts in the original statement of claim would clearly indicate that the facts as stated therein were in respect of the cause of action for negligence and nuisance. In my judgment, in order to amount to a cause of action for breach of a statutory duty, the relevant statute must be pleaded and the breach must be stated in order to prove the liability. And in regard to the issue of damages, the plaintiffs must show that the damages suffered fall within the ambit of the statute. How could there be a breach of the statutory duty if the statute was not pleaded by the plaintiffs?

CONCLUSION

**[75]** I have examined almost every conceivable point raised by the parties. Inconsequential points have not been ventilated in this judgment as they were without merits. In my judgment, the plaintiffs' application to introduce new causes of action in the proposed amended statement of claim must fail. In my judgment, the plaintiffs have failed to satisfy the conditions required under O 20 r 5(5) of the RHC and that leave to amend the statement of claim in order to include paragraphs relating to the breach of statutory duty, misfeasance of public office and negligence

A should be disallowed. The upshot of it all was this. That the defendant's appeal in encl 35 (now encl 27) should be allowed with costs.

*Defendant's appeal allowed with costs.*

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Reported by Peter Ling

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